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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 63

THE HODGE DRIVE-IT-YOURSELF COMPANY ET AL., APPELLANTS,

vs.

THE CITY OF CINCINNATI ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

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City Solicitor;
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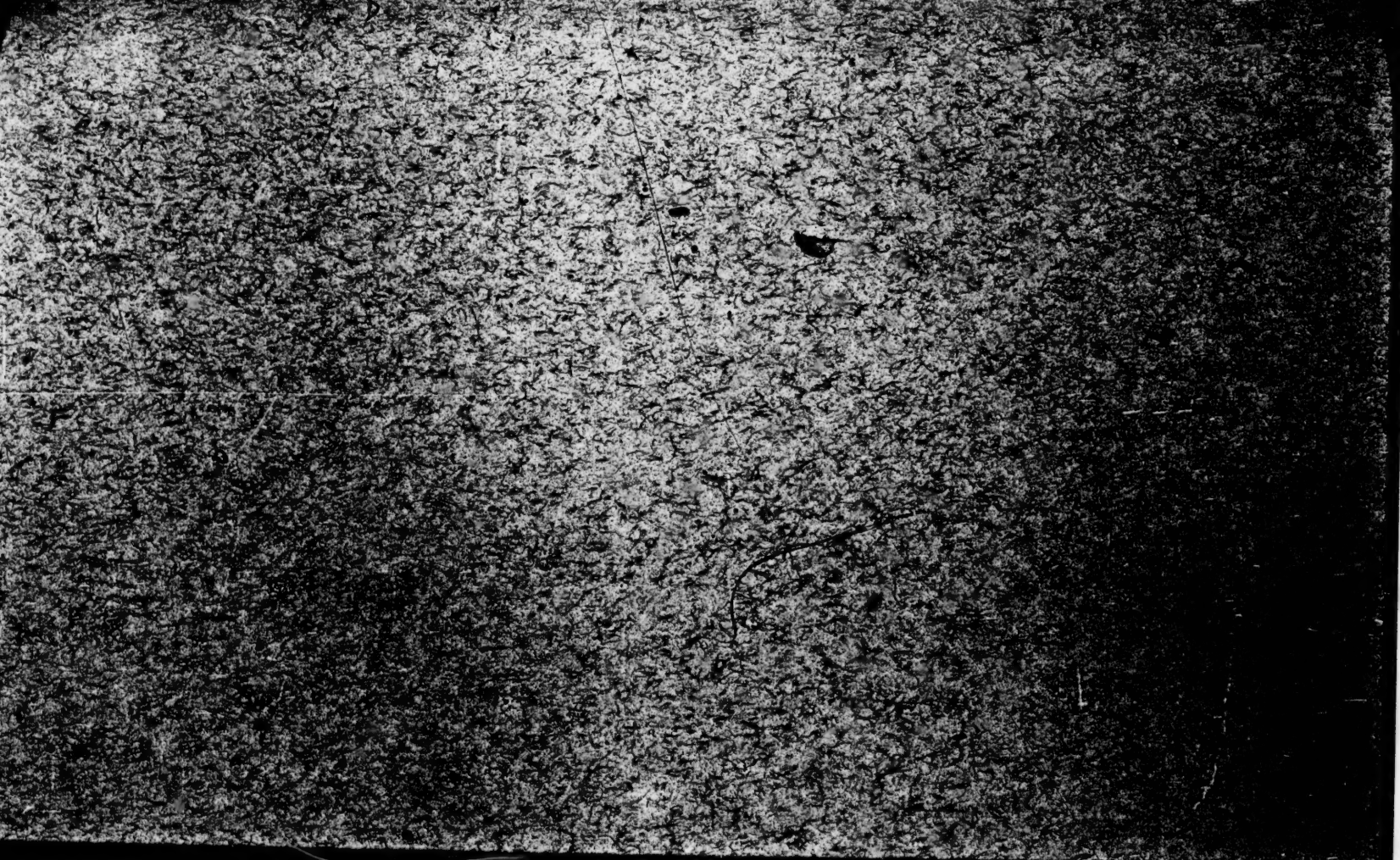

TABLE OF AUTHORITIES CITED.

	Page
American Law Reports, Vol. 22, p. 230	19
Auto Transit Co. v. Fort Worth, 182 S. W., 685, 692	31
Billings v. Railway Co., 92 O. S., 478	10
Breuer v. P. U. C., 118 O. S., 95	38
City of Dallas v. Gill, 199 S. W., 1144	21
City of Rockford v. Nolan, 316 Ill., 60	35
Clark v. Poor, 274 U. S., 554, 557	19
Coleman v. P. U. C., 115 O. S., 638	38
Commonwealth v. Theberge, 231 Mass., 386	21
Constitution, Ohio, Article XVIII, Sec. 3	12
Craig v. P. U. C., 115 O. S., 512	37
Cusack v. Chicago, 242 U. S., 526	36
Ex Parte Cardinal, 150 Pac., 348	19, 29
Fifth Ave. Coach Co. v. N. Y. C., 221 U. S., 467	15
Froelich v. Cleveland, 99 O. S., 376	10
General Code, Ohio, Sec. 3714	13
General Code, Ohio, Sec. 3632	7, 13
Genusa v. Houston, 10 S. W. (2d)	25
Hadfield v. Lundin, 168 Pac., 516	32
Hazelton v. Atlanta, 144 Ga., 775	21
Hess v. Pawloski, 274 U. S., 352	19
Hissem v. Guran, 112 O. S., 59	37
Houston v. Des Moines, 176 Iowa, 455	21
Kane v. New Jersey, 242 U. S., 160, 167	18
Klein v. Cincinnati, 30 O. L. R., 217	14, 35
Lane v. Whitaker, 275 Fed., 476, 480	21
Melconian v. Grand Rapids, 218 Mich., 397	21
Michigan P. U. C. v. Duke, 266 U. S., 570	11
Motor Freight, Inc., v. P. U. C., 120 O. S., 1	38
Murphy v. City of Toledo, 108 O. S., 342; 140 N. E., 626	11, 29
Nolan v. Reichman, 255 Fed., 812, 818	15, 34
Ordinance, City of Cincinnati, No. 50—1929	2
Pacific Express Co. v. Seibert, 142 U. S., 339, 353	15
Packard v. Banton, 264 U. S., 140	8, 14, 17, 21, 29, 34
People v. Martin, 203 App. Div., 423	8, 17, 20, 28, 31
Powell v. Pennsylvania, 127 U. S., 684	36
Pritz v. Messer, 112 O. S., 628	36
Puget Sound Traction Co. v. Grassmeyer, 173 Pac., 505	32
Rowe, Jr., v. Cincinnati, 117 O. S., 382	14

Page

San Antonio v. Besterio, 209 S. W., 472..... 5, 23, 25
Schoenfeld v. Seattle, 265 Fed., 726, 730..... 15
Smallwood v. Jeter, 244 Pac., 149..... 11
Sprout v. South Bend, 277 U. S., 163, 171..... 19
State v. Bee Hive Auto Service, 242 Pac., 384..... 11
State ex rel. McBride v. Deckebach, 117 O. S., 227..... 17
State v. Seattle Taxicab & Transfer Co., 91 Wash., 416..... 21, 34
Truax v. Corrigan, 20 Ariz., 7; 176 P., 570; Id., 257 U. S., 312; 42 S. Ct., 124; 66 L. Ed., 254; 27 A. L. R., 375..... 17, 27
Welch v. Hartnett, 215 N. Y. S., 541..... 8, 23
West v. City of Asbury Park, 89 N. J. L., 402..... 21

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BRIEF ON BEHALF OF APPELLEES.

The appellants, plaintiffs below, instituted proceedings in the Court of Common Pleas of Hamilton County, Ohio, alleging, in substance that Ordinance No. 50-1929 of the city of Cincinnati, Ohio, was unconstitutional, invalid, and void; and prayed that the defendant, the city of Cincinnati, and its various officials, be enjoined from enforcing said ordinance, from interfering with their business and the operation of their automobiles by the renters of the same. The defendants filed an answer admitting most of the facts pleaded, but denying the impossibility of obtaining necessary insurance for indemnity bonds as required by various sections of the said ordinance and denying

that the ordinance, or the respective provisions complained of, were unconstitutional and void and praying for a dismissal of the plaintiffs' petition. After the issuing of a temporary injunction by the Court of Common Pleas of Hamilton County, Ohio, on the filing of the suit the matter came on for final hearing on the evidence, was submitted to the court and the Court of Common Pleas (Struble, J.) found on the issues joined, in favor of the plaintiffs, declaring the various sections of the ordinance complained of to be unconstitutional and inoperative, as to the plaintiffs, and a decree was entered accordingly, permanently enjoining and restraining the defendants from interfering with the operation of plaintiffs' business.

An appeal was taken by the defendants to the Court of Appeals of the First Appellate District of Ohio where the case was tried on the transcript of the evidence, taken in the trial court, together with some additional new evidence presented to the appellate court. After consideration, the appellate court rendered its decision reversing the Common Pleas Court and holding said ordinance to be constitutional and valid and thereupon entered a decree dissolving the injunction, and dismissing the plaintiffs' petition. The Supreme Court of Ohio affirmed the Court of Appeals and its opinion is reported in 123 O. S. 284, 175 N. E. 196.

The plaintiffs contended that Sections 65-1*d*, 65-1*e*, 65-3, 65-7, 65-8, 65-9, 65-10, 65-11, 65-13, 65-42, 65-45, 65-47, and 65-48 of Ordinance No. 50-1929, of the city of Cincinnati (Record, page 97, Ex. 1) are unconstitutional. These sections in substance provide for the licensing and regulation of driverless or drive-it-your-

self automobiles, and impose the requirements that those companies engaged in the business of renting or leasing such vehicles carry insurance or secure surety bonds to indemnify persons for damage or injury caused by the negligent operation of the automobiles either by the companies themselves or by the persons renting the automobiles.

We contend that the ordinance is a valid and constitutional enactment for the following reasons:

1. The business of renting or leasing automobiles to be used to transport the lessee over the streets of the city involves the use of the city streets for private gain.

2. There is no right as such to the use of the streets for private gain, but such use may be regulated and even prohibited by the municipality under its police powers and under express statutory authority.

3. The requirement of insurance or surety bonds does not violate any constitutional provisions nor does it directly or indirectly create liability without fault.

4. The ordinance is neither oppressive nor unreasonable.

ARGUMENT.

1. The business of renting or leasing automobiles to be used to transport the lessee over the streets of the city involves the use of the city streets for private gain.

Plaintiffs complain against the ordinance principally on the ground that it is an attempt by the city to regulate a purely private business, that the leasing of auto-

mobiles to be driven by the lessee does not place the lessor in the status of a common carrier, and that therefore the business is not clothed with any public interest which subjects it to regulation. In order that there may be no misunderstanding as to the issues, we desire to emphasize at the outset that it is not the claim of the city that concerns operating driverless automobiles are common carriers. The ordinance nowhere classifies these vehicles as common carriers. The power of the city to regulate vehicles which use its streets is not limited to the regulation of those which fall within the definition of common carriers, but extends as well to all vehicles which are used upon the streets in connection with the maintenance of a business operated for the purpose of providing a transportation service. Therefore the question of whether or not common carriers are involved is not pertinent to the issue.

The pertinent question to be answered in this case, therefore, is whether the business of the plaintiffs is a business which involves the use of the public streets for the purpose of gain or profit. This question, we submit, can be answered only in the affirmative. The plaintiffs are in an entirely different position from those who use the streets in the operation of pleasure vehicles, or those who operate delivery vehicles or trucks as a necessary incident to the selling of merchandise or similar business activities. *The business of the plaintiffs is to create a profit for themselves by furnishing a transportation service.* They are in precisely the same position as the taxicab companies in that both businesses are based upon obtaining a rental

from the use of the city streets by their automobiles. Both taxicabs and driverless automobiles are rented on a mileage basis. The fact that a driver is furnished with a taxicab and that none is furnished with the driverless car is a difference clearly insufficient to render legal principles which the courts hold applicable to the one, inapplicable to the other.

The Supreme Court of Ohio says in its opinion (123 O. S. 284, 175 N. E. 196, at page 198):

> "Concededly, the automobiles are rented on a mileage basis and for operation over the public streets, so that for every mile of travel for which a rental fee is exacted of the lessee, a mile of public street has been used in earning such rental fee, and, while the use of the public street by the lessee has been a use of such streets by a member of the public in the ordinary way, such use by the lessor has been a use for his own gain, just as the use of the streets by street cars, busses and taxicabs is a use by them for their own gain."

In all of the cases in which the courts have been called upon to decide whether the driverless automobile companies are engaged in an extraordinary use of the public streets and therefore subject to the police authority of the city, the courts have held that the business is public in its nature. We have found not a single case to the contrary.

In the *City of San Antonio* v. *Besterio*, 209 S. W. 472 (Texas Civil Appeals, 1919) the court passed upon a question similar in all respects to that involved in the instant case. At page 474 the court uses this pertinent language:

"The argument that appellees in effect sell their automobiles and that the entire transaction is completed upon their own premises is unsound. The business of renting automobiles to the public for temporary use over the streets of San Antonio is not the private use by an individual of his property * * * the contention that the use of the streets forms no part of the business conducted by appellees is sophistical. The chief element of value to this business is that their automobiles can be and will be used upon the streets of the city. * * * The quintessence of the business is to obtain a rental from the use of the streets by its automobiles. That this use of the streets is contemplated, intended, and forms a real thing of value to defendant's business is so obvious as not to require discussion." The business of the appellees is to derive a profit for themselves by the operation of their automobiles over the streets of San Antonio just as the street railway company, jitney, and service companies do. The fact that these last mentioned companies have the driving done by employees and the appellees have it done by the lessees does not change the result that appellees' business is to burden the streets in the conduct of its business. There is greater necessity, it seems to us, for the city to regulate the use of the streets when the driving is done by lessees instead of employees. Where the automobiles are driven by employees over whom the employer has supervision and control, there is likely to be less danger to the public and the immoral uses possible can be more readily checked than when the automobiles are promiscuously if not indiscriminately left to the public. Since the busi-

> ness contemplates and does make use of the streets, the business is subject to license and regulation by the city."

Counsel for plaintiffs attempts to discredit this Texas decision by asserting that the power which the city of San Antonio has under its charter and under the state laws was much broader than that possessed by the city of Cincinnati. This claim is without foundation in fact, for, as we will show by reference to the Constitution and Statutes, the city of Cincinnati has complete home-rule authority and power to regulate the use of its streets.

Furthermore, and aside from the provisions of the charter of the city of Cincinnati, as was found by the Ohio Supreme Court in its opinion below, the city of Cincinnati has specific power of regulation of its streets conferred upon it by Section 3632 of the General Code of Ohio. The court said (175 N. E. at page 199):

> "We do not find it necessary to determine whether the city of Cincinnati derives its power to enact the ordinance in question under the home rule provision of the Constitution of Ohio, since, if the power be not there conferred, it has been specifically conferred by Section 3632 of the General Code of Ohio, which provides that municipalities shall have the power 'to regulate the use of * * * automobiles * * * kept for hire * * *.'
>
> The power of the municipality, within its jurisdiction, in reference to regulating the business of leasing automobiles to be driven by the

lessee, is as great as that of the State within its jurisdiction."

In *Welch* v. *Hartnett*, 215 N. Y. S. 541, 127 Misc. Rep. 221, 1926, the court held that the operation of driverless automobile companies was affected with a public interest, that the rental of these cars involved the use of the public streets for gain, and that therefore a regulation similar to the ordinance of the city of Cincinnati was a valid and constitutional provision.

Syllabus 1 of this case reads:

"The use of streets for purposes of gain is special and extraordinary and generally may be prohibited or conditioned as legislature deems proper."

At page 222 the court says:

"Subdivision 4 of said section which is applicable to the plaintiff, provides that a person * * * engaged in the business of renting or leasing motor vehicles to be operated upon the public highways shall be subject to the provisions of this section. This section so far as it requires bonds to be filed by persons carrying passengers for hire in motor vehicles has been held to be valid and constitutional. (*People* v. *Martin*, 203 App. Div. 423, affd. 235 N. Y. S. 50, *Packard* v. *Banton*, 264 U. S. 140.)

"A person engaged in the business of leasing automobiles has the vehicles registered in his name. If the automobile so used were involved in an accident it might be difficult or impossible to determine who was operating the car at that time. The records kept by the lessor

might not be complete and might not show to whom the car was leased or the lessee might have given a fictitious name.

"I believe that the owner of an automobile who leases it to an incompetent driver or an irresponsible person should be required to indemnify those who are injured as a result of the negligence of the operation of such a vehicle. This statute will tend to prevent men engaged in such business from renting automobiles to those who are immature or imprudent, unskillful or inexperienced in the operation of such vehicle and they will be likely to use care to see that their automobiles are operated by fit and prudent drivers. Certainly if it is reasonable and proper for the legislature to require owners of taxicabs to file indemnity bonds, such provision may also be applied to those owning automobiles which are leased to be operated by the lessee. In both cases the cars are driven by other than the owners, both are using the streets for private gain. The use of the streets for the purpose of gain is special and extraordinary and generally at least may be prohibited or conditioned as the legislature deems proper."

The Welch case is a clear-cut decision upon the very questions which are before the court in this case. It is of no importance to point out, as counsel for plaintiffs does in his brief, that in the New York case the regulation was provided by a State statute whereas we are concerned with a municipal ordinance. Once having established that the driverless automobile business is subject to regulation under the police power, it

necessarily follows that this regulation may be either by the State or by municipal corporations under their home-rule authority. *The Supreme Court of Ohio has, in fact, in numerous decisions held that that power of municipalities to regulate and control extraordinary uses of their own streets is even more extensive than the power of the State.*

Billings v. *Railway Co.*, 92 O. S. 478:

In this case the court held that a charter municipality, as an incident of local self-government and the right of control over its streets, had the power to grant permission to a company to operate a street railway and that the charter provisions which authorize the granting of such permission without the consent of abutting property owners was valid even though general statutes of the State require such consent to be obtained.

Froelich v. *City of Cleveland*, 99 O. S. 376:

In this case an ordinance of the city of Cleveland prohibited a vehicle carrying more than ten tons in weight including the weight of the vehicle from operating over the public streets of the city. General statutes of the State limited loads to be carried on public streets and highways to twelve tons. The court held that an ordinance was a proper exercise of the city's power of local self-government and was enforcible within the city regardless of different provisions of the State law.

Murphy v. *Toledo*, 108 O. S. 342, 140 N. E. 626:

"Syllabus 1. Municipalities have full power to regulate or control the use of their own streets."

In support of the argument that the business of the plaintiffs is a private business and not a public business which can be regulated, opposing counsel cites the cases of *State* v. *Bee Hive Auto Service Co., Inc.*, 242 Pac. 384; *Smallwood* v. *Jeter*, 244 Pac. 149; and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570. A reading of these cases discloses that they are all decisions to the effect that legislation which is designed to cover common carriers or public utilities does not apply to concerns renting or leasing automobiles for the reason that these concerns are not common carriers or public utilities and cannot be made so by judicial fiat. We have no dispute with this conclusion. In other words, it is clear that driverless automobile companies are not public or private *common carriers* and therefore cannot be regulated under a statute or ordinance which attempts to regulate such carriers. The person who rents the car does his own driving and is not being carried as a *passenger* by the company owning the car. The Cincinnati ordinance recognizes this fact in Section 65-1*e* which defines the driverless automobile as a public vehicle rented or hired out to a person other than the owner and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation. However, even with the elements of the transportation of *passengers* eliminated,

the fact remains that their automobiles are being operated over the streets for a purpose of transporting the lessee or rentee and thereby to enable the owner to derive from this special use of the streets private profit. This is the element which brings the business under the police power regardless of whether it is a common carrier or a public utility or not.

None of the cases cited by counsel for plaintiffs expressly covers the operations of driverless automobiles. Had such vehicles been treated as they are under the Cincinnati ordinance instead of an attempt being made to include them under a classification of common carriers, a different conclusion would, in all probability, have been reached by the courts.

In other words, the cases cited by opposing counsel do not decide that it is beyond the power of a city or State to regulate driverless vehicles, but merely that a regulation specifically directed against common carriers and automobiles transporting passengers cannot be enforced against driverless automobile companies since these are not common carriers and do not transport *passengers*. These decisions, correct as they may be, have nothing to do with the issues in this case.

2. There is no right to use the streets for private gain, but such use may be regulated and even prohibited by the municipality under its police power and under express statutory authority.

The city of Cincinnati derives its power to regulate its streets from Section 3 of Article XVIII of the Constitution (the home-rule provision) and General Code,

Sections 3714 and 3632. These provisions read as follows:

> "*Article XVIII, Sec. 3.* (POWERS.)—Municipalities shall have authority to exercise all powers of local selfgovernment and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
>
> "*General Code, Sec. 3714.* Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."
>
> "*General Code, Sec. 3632.* (VEHICLES, AND USE OF STREETS.)—*To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of streets by persons who use vehicles, or solicit or transact business thereon;* to prevent and punish fast driving or riding of animals, of fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation."

These constitutional and statutory provisions grant ample power to the city to exercise regulatory control

over those who make a special or private use of the streets.

Section 3632 seems to us to be determinative of the questions in this case. We do not see how the plaintiffs can escape from the clear and express provision of the section. This is the section referred to by the Court of Appeals of Ohio in the recent decision sustaining the city's regulation of bus drivers. *Klein* v. *City of Cincinnati,* 30 O. L. R. 217, Ohio Law Reporter and Bulletin, September 16, 1929. The Supreme Court of Ohio overruled a motion to certify in this case.

In the case of *Rowe, Jr.* v. *Cincinnati,* affirmed by the Supreme Court of Ohio in 117 O. S. 382, it was held that the city, under its general police power, could prohibit persons from maintaining gasoline pumps upon the sidewalks. At page 392 of the Supreme Court opinion, the Court said:

> "Since the plaintiff in error has no right derived from any source to the permanent use of the streets for his private purposes, no property right is involved in the controversy, and no constitutional right will be invaded by the removal of the pump."

In *Packard* v. *Banton,* 264 U. S. 140, the court upheld the validity of a statute of New York requiring operators of vehicles for hire to file security or insurance to indemnify persons damaged by the operation of such vehicles.

At page 144 this Court makes this statement:

> "The contention most pressed is that the Act unreasonably and arbitrarily discriminates

against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private end, and in favor of street cars and motor omnibuses. If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally at least, may be prohibited or conditioned as the legislature deems proper."

This proposition of law that streets are for the public and cannot be burdened by those seeking to secure a profit from their use except under regulation is so well established that it is needless to multiply quotations from the numerous cases in which the rule has been applied. We cite just a few of these cases.

Fifth Avenue Coach Co. v. *New York City*, 221 U. S. 467.
Pacific Express Co. v. *Seibert*, 142 U. S. 339, 353.
Nolan v. *Reichman*, 225 Fed. 812, 818:
Schoenfeld v. *Seattle*, 265 Fed. 726, 730.

It should be noted that appellants themselves recognize that they do not operate their vehicles as a matter of right. In their petition appellants plead that "each of said plaintiffs has paid to the city of Cincinnati the required license fee on each of their automobiles for the privilege of operating their said

vehicles in the city of Cincinnati'' and in the next paragraph ''and by virtue of Ordinance No. 89 of the Ordinances of the city of Cincinnati, passed on February 20, 1929, and effective immediately, applications were made by each of said plaintiffs for licenses from March 1, 1929, to December 31, 1929.'' If the arguments of counsel were sound, that is, that appellants are engaged in a purely private business, there would obviously be no necessity for these companies to secure licenses from the city or to make application therefor. The fact that they have done so, and that appellants pray in their petition that the city ''be enjoined from revoking these licenses,'' can only indicate that plaintiffs themselves recognize that their business is carried on pursuant to a privilege and not a legal right.

3. The requirement of insurance or surety bond does not violate any constitutional provisions nor directly or indirectly create liability without fault.

The question of the constitutionality of the insurance and surety bond provisions of the Cincinnati ordinance is by no means a novel one. A large body of case law has grown up around this very proposition, and the unanimous opinion of the courts in which the question has been presented is that legislation of this type violates no constitutional provisions. These decisions rest upon the ground that measures which tend to require that drivers of vehicles be financially responsible for injuries resulting from their negligent acts have a direct and substantial relation to the protection of the public safety and health because they

necessarily tend to make such drivers more careful in the operation of their cars.

The Ohio Supreme Court said in its opinion in this case (175 N. E. 199):

> "The police power, in furtherance of public safety, health, and welfare, is coextensive with the public need, and the reasonableness of its exercise must be measured largely by the same standard. The daily toll of life, limb, and property exacted by the operation of automobiles generally upon the public streets and highways proclaims the public need for police regulation of all automobile operation. Because, perchance, the ordinance in question might well have regulated other classes of automobile users, or because, perchance, such regulation might more effectually have been accomplished by state regulation, does not militate against the power to regulate a proper and reasonable class of automobile users, nor against the power of a municipality, expressly conferred, to enter upon an unoccupied field within its own jurisdiction. *Truax* v. *Corrigan,* 20 Ariz., 7, 176 P., 570; Id., 257 U. S., 312, 42 S. Ct., 124, 66 L. Ed., 254, 27 A. L. R., 375; *People* v. *Martin, supra; Packard* v. *Banton, supra; Murphy* v. *City of Toledo,* 108 Ohio St., 342, 140 N. E. 626.

The Supreme Court of Ohio in the case of *State, ex rel., McBride* v. *Deckebach,* 117 O. S. 227, recently passed upon this question in connection with those sections of the same ordinance now before this court requiring insurance as a condition precedent to the

operation of taxicabs in the city. These provisions are exactly the same as those involved in this case. The court held as follows:

> "*Syllabus 1.* Sections 702-2c and 702-2d (which are now by amendment Sections 65-7, 65-8, 65-9, 65-10, of the ordinance before this court) of the Code of Ordinances of the city of Cincinnati, which require an applicant for a license to operate a taxicab within the city of Cincinnati to furnish the city auditor of Cincinnati with a policy of insurance or in lieu thereof with a surety bond executed by responsible individuals or by a company authorized to write such bonds indemnifying such operator against loss or injury from the negligent operation of such taxicab, are valid and constitutional.
>
> "*Syllabus 2.* Under Article XVIII, Section 3, of the Ohio Constitution, a charter municipality has power to require a taxicab operator to furnish insurance or bond indemnifying such operator against loss or injury from the negligent operation of his taxicab as a condition precedent to the issuing of a license to operate such taxicab on the city streets."

Mr. Justice Brandeis, speaking for this court, in *Kane* v. *New Jersey,* 242 U. S. 160, 167, said:

> "The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. * * * It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to ensure safety."

And in *Sprout* v. *South Bend*, 277 U. S. 163, 171, this court said:

> "Objection under the commerce clause is made also to the requirement of liability insurance. There being grave dangers incident to the operation of motor vehicles, a state may require users of such vehicles on the public highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. *Packard* v. *Banton*, 264 U. S. 140. Compare *Kane* v. *New Jersey*, 242 U. S. 160, 167; *Hess* v. *Pawloski*, 274 U. S. 352; *Clark* v. *Poor*, 274 U. S. 554, 557. It may consistently with the Federal Constitution, delegate by appropriate legislation a part of this power to a municipality."

And in *Hess* v. *Pawloski*, 274 U. S. 352, 356, Mr. Justice Butler speaking for this court, said:

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways."

In *Ex parte Cardinal*, 150 Pac. 348 (California), an ordinance of San Francisco provided that the owners of jitney buses should give a bond in the sum of $10,000 as surety for the payment of all injuries on account of negligent operation. The court held

that such an ordinance was within the police power of the city. At page 350 the court says:

> "We see no reason to doubt the power of the state or any county or municipality in the exercise of its police power of regulation, to require security in the shape of a bond or insurance policy from its licensees, in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public. If the power to do this exists we are satisfied that it cannot properly be held by the court that the requirement of such security by the ordinance before us was an unreasonable exercise of its power by the Board of Supervisors of San Francisco.
>
> "In the case at bar we have persons undertaking to pursue upon the public streets of the city and the county of San Francisco, an occupation that if negligently conducted, is fraught with danger not only to those who may be passengers but also to the public generally upon those streets. The occupation is one that may properly be regulated by the public authorities, and the insistence of a bond or other security in a reasonable amount to indemnify those who may be injured by the negligence or a legal operation of the business, appears to us not to be beyond the range of reasonable requirement."

Other cases to the same effect, holding that legislation such as that involved in this case is neither a denial of due process of law nor of the equal protection of the laws, are as follows:

People v. *Martin,* 197 N. Y. S. 28, aff'd 235 N. Y. 550.

Packard v. *Banton,* 264 U. S. 140.
City of Dallas v. *Gill,* 199 S. W. 1144 (Texas Civil Appeal 1917).
Hazelton v. *Atlanta,* 144 Ga. 775, 87 S. E. 143.
West v. *City of Asbury Park,* 89 N. J. L. 402, 99 A. 190.
Commonwealth v. *Theberge,* 231 Mass. 386, 121 N. E. 30.
Houston v. *City of Des Moines,* 176 Iowa 455, 156 N. W. 883.
State v. *Seattle Taxicab & Transfer Co.,* 91 Wash. 416.
Melconian v. *Grand Rapids,* 218 Mich. 397.
Lane v. *Whitaker,* 275 Fed. 476, 480.
See also note collecting cases 22 A. L. R. 230.

The decisions in the above cases do not depend upon the fact that the regulation was directed against common carriers, but the opinions all indicate that the courts upheld the enactments because they constituted proper police regulations of persons and firms who were making a private and special use of the streets, as distinguished from ordinary public uses and because the regulations were promotive of the public welfare and safety.

As we have shown above, the first of these elements, the extraordinary use of the streets, is present in the driverless automobile business. The second of these elements, the protection of the public safety and welfare, is, we submit, even more apparent in insurance requirements for damages caused by driverless automobiles than in similar requirements for taxicabs and jitney buses. The taxicab operator is directly under the control of the company owning the car. He is a

person of assured driving ability because he has passed all the tests necessary to obtain a license from the city before he can drive. Moreover, he is in practically all cases a resident, he is compelled to make a report to his company of all accidents, and he can be easily located, if need be, after an accident. The driverless companies lease their cars indiscriminately to persons who may apply and who can leave the small deposit required; there is no assurance that the person is a careful, prudent, and experienced driver, except his own answers to the perfunctory questions about his driving ability which the company asks him; he is almost in all cases financially irresponsible; he frequently is not a resident of the city and therefore is not accessible for information or service of process after he has caused an accident; it is frequent that he uses a fictitious name in renting the car, and there is no method of compelling him to report accidents. In fact the danger to the public, and the possibility of damage through the operation of these driverless cars, is so great that one of the witnesses for the plaintiffs (Mr. Curry) frankly stated from the witness stand that in his opinion "*the driverless automobile is the greatest menace on the streets today*" (R., p. 48). This is further eloquently corroborated by the testimony that a number of insurance companies have found this business to involve so great a risk that they refuse to write insurance for these concerns. If this business is attended with such great possibility of damage and injury to persons lawfully using the highways, so that companies whose business is the writing of insurance will not take the risk in-

volved in insuring these concerns, it seems to us highly reasonable that the city under its police power can properly take cognizance of this matter and provide a regulation that will both cause the companies to be more careful in the renting of their machines, and assure persons who may be injured thereby of compensation upon the establishment of the legal liability of the driver of the car.

Recognizing that the necessity for the regulation of the driverless automobile is equally as urgent as regulation of taxicabs and jitney buses, the courts in which this question has arisen, have all extended the principles adopted in the taxicab cases to driverless automobile companies.

San Antonio v. *Besterio,* 209 S. W. 472.

Welch v. *Hartnett,* 215 N. Y. S. 541, 127 Misc. Rep. 221.

A. The Ordinance Does Not Create Liability Without Fault.

Counsel for the appellants contends that since the companies are not liable for damages caused by people who rent their cars, a requirement that they deposit with the city insurance covering the liability of the company and the liability of the driver of the car as well has the effect of compelling companies to assume liability without fault. This argument is clearly fallacious. The ordinance in no sense increases the liability of driverless automobile operators, or creates rights of action which did not exist before the passage of the ordinance. The general rules

of tort liability are in no way changed by the ordinance. The injured party has no greater legal right by reason of this ordinance than he has without it. The ordinance simply makes the plaintiffs and those who rent their cars *responsible judgment creditors.*

This will come more clearly into focus if we suppose the ordinance to provide that before a company may have a license to rent out cars it must satisfy the auditor of its financial responsibility and the fact that the persons to whom it rents its cars will also be financially responsible. Such a provision is in effect a provision of the ordinance in question. It would add nothing to the remedial laws of the State. It would only require a man to assure the city before he enters a business that may well cause damage to others, that he and the persons who rent his cars to be driven over the streets, be in a financial position to meet the requirements of the State law. The injured party under such a provision would proceed exactly as he does without the ordinance. He would secure a judgment in accordance with common law principles of tort liability. In fact he would take every step under the law of the State that he would if the ordinance did not exist. The only difference is that by reason of the requirement that the licensee be financially responsible and see to it that those to whom he leases his cars are financially responsible, there is created a condition of fact whereby the legal remedies created by the general State law are given substance. The injured party is actually compensated for the injury done instead of having a mere empty and meaningless right

to obtain a worthless judgment against a financially irresponsible party.

Although the company is compelled to pay the premium for the insurance in the first instance, this cost will, in practice, be borne by the persons who rent the cars either directly by the payment of an insurance charge or indirectly by the inclusion of this cost in the rental fee.

We submit, therefore, that the argument that the ordinance is remedial or imposes liability upon the plaintiffs without fault or negligence is entirely without merit. The ordinance does not either directly or indirectly create any new remedy or increase plaintiffs' legal responsibility, and, therefore, does not pretend to invade that authority to establish general laws which is the exclusive province of the State.

Counsel for the plaintiffs has referred to the case of *Genusa* v. *Houston,* 10 S. W. (2d) 772. This case, which followed the other Texas case cited above in this brief, *San Antonio* v. *Besterio,* held that the insurance provisions of the San Antonio ordinance were invalid. When we examine this case we find that the ordinance involved was essentially different from the Cincinnati ordinance. Section 194 of the San Antonio ordinance read, in part, as follows:

> "* * * The principal (that is, the automobile company itself) shall pay all legal damages for injuries sustained by any person, including injuries resulting in death, caused by or on account of the negligence or willful act of the principal or operator of the car.

> * * * Said bonds or insurance policies shall provide *that suit may be brought thereon directly in connection with the principal* in any and all causes of action covered by its provisions."

It is thus apparent that the San Antonio ordinance attempted to change common law rules of tort liability, in that it enables a person injured by a "driverless auto" to bring an action *directly against the company owning the car,* although there was no agency or respondent superior relation, but merely a relation of bailor and bailee. Obviously this was an attempt by ordinance to change general laws of tort responsibility established by the State, and for that reason we believe the court was entirely correct in striking down this legislation.

The Cincinnati ordinance, however, has no such objectional features. *It does not authorize an injured party to bring a suit against the company.* Injured persons can proceed only against the rentee or driver of the car. The company cannot be brought into the case in any way. But if a judgment is obtained against the rentee, this judgment must be paid by the insurance company which insures *his* liability.

This example may bring this point out more clearly. The ordinance requires insurance to the extent of $5000 for injuries or death of any one person in one accident. Now if Mr. Jones rents a car from The Hodge Company and through his negligence injures Mr. Smith, Mr. Smith may then sue Mr. Jones and no one else. If he gets a judgment of $10,000 against

Jones the insurance company stands good up to $5000. for the additional $5000, Mr. Jones himself is liable. The Hodge Company cannot be made to pay.

Under the San Antonio ordinance, however, Mr. Smith, in the first place, could sue the Hodge Company directly, and in the second place, he could collect from them the balance of his judgment over the amount of the insurance policy.

We submit that the differences between these ordinances make the Texas case totally inapplicable to the case at bar.

B. The Ordinance is not a Denial of Equal Protection of the Law.

Counsel for the plaintiffs argues in his brief that to require operators of driverless automobiles to provide insurance and not to require the owners of other vehicles such as trucks and private automobiles is arbitrary and in violation of the equal protection provision of the Constitution.

The question of creating classes to whom laws may apply has been before the courts many times and upon this subject the Supreme Court of the United States in *Truax* v. *Corrigan*, 257 U. S. 312, 337, has said:

> "In adjusting legislation to the needs of the people of the State the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary.

> * * * Classification is the most inveterate of our reasoning processes. We can scarcely think without consciously or unconsciously exercising it."

The right of a city to make its laws applicable to one class of persons and not to another has been passed upon by so many courts and is so well established that we feel it unnecessary to cite further authority. The only remaining question, therefore, is as to the reasonableness of the present ordinance. The authorities are uniform in upholding the type of classification involved here.

In *People* v. *Martin*, 197 N. Y. S. 28, 30, the court said:

> "It is contended that the legislature in this legislation has made a classification which is so arbitrary and unreasonable as to render the statute violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States. This contention is based upon the claim that the act imposes a burden on the owners of taxicabs while exempting other persons similarly circumstanced. But it cannot be assumed that the legislature acted without information justifying the classification, and reasons will at once suggest themselves why it is desirable that the public shall be protected to the extent of being able to recover some amount of damages from the owners of such vehicles, which have been responsible for so many injuries in the public streets of New York City, and even deaths therein as the records show."

In *Packard* v. *Banton,* 264 U. S. 140, above cited, this court held a statute requiring persons engaged in the business of carrying persons for hire in motor vehicles upon the streets is:

> "Not in violation of equal protection of the laws, either because it applies to only cities of the first class, or because it does not apply to persons operating motor vehicles for their own private ends, or because it does not apply to street cars and omnibuses which are regulated under another law."

In the case of *Ex parte Cardinal,* 150 Pac. 348, the court discusses at length and sustains the reasonableness of an ordinance requiring the payment of a license fee by jitney buses and the giving of an indemnity bond although there was no similar requirements for other motor vehicles.

In *Murphy* v. *Toledo,* 108 U. S. 342, the court says:

> "*Syllabus 2.* In such control (of the streets) or regulation a municipality may make any reasonable classification of vehicular traffic in the use of its streets.
>
> "*Syllabus 3.* The judgment of a legislative body as to a reasonable classification cannot be questioned, except when it is in clear conflict with some express provision of State or Federal Constitutions."

4. The ordinance is not oppressive or unreasonable.

It is contended that the ordinance is impracticable, unworkable, and oppressive in that it requires insurance which the plaintiffs cannot obtain. The evidence,

we believe, clearly shows that this is not the fact. While it is true that a number of insurance companies will not write this type of business because of the great risk involved, there are other companies from whom such insurance could be obtained. The evidence shows that there are at least three driverless companies in Cincinnati, the Kissel-Skiles Company, the Saunders Company, and the Bohannon Company, which have been carrying this type of insurance for a number of years and have all filed policies with the city under the new ordinance. These concerns secure their insurance from three different companies. The testimony is that one of these companies, The General Casualty & Surety Company of Detroit, will not write any more of this insurance in addition to that it now has. However, there is no showing that the plaintiffs cannot obtain insurance either from the Utilities Indemnity Company of St. Louis or The Employers' Indemnity Company of Kansas City.

In addition, the testimony shows that the Mercer Company will write this type of insurance, in fact, the agent for the Mercer Company had carried on negotiations with several of the plaintiffs until they informed him that they were not going to get this insurance until the decision of this case. Counsel for the plaintiffs complains that the Mercer Company is a small company and is irresponsible. There is no evidence of this fact. There is no evidence that this company has ever failed to pay judgment rendered against one of its policyholders. Furthermore, the question of the sufficiency of the policy is entirely a

matter for the city treasurer to pass upon. There is no question but that these companies could obtain the necessary insurance if they desired, but, of course, they do not wish to do so if they can prevent it through this proceeding. *Moreover, the ordinance allows as an alternative to insurance, both surety bonds and personal sureties. There is no evidence that these forms of security cannot be obtained.*

In reference to the prohibitive cost of insurance we will content ourselves merely with pointing out first, that the premium is over 50 per cent *less* than the premium for taxicab insurance, and, second, that the testimony shows that the Saunders System, which has carried this type of insurance required by the Cincinnati ordinance for several years recently *reduced its rates below that of the plaintiffs' its local competitors.* The claim that plaintiffs cannot comply with the terms of the ordinance is wholly fictitious. However, even if there were some basis for this contention, it would not be an argument against the validity of the ordinance. Similar claims have been advanced in a number of cases, and the response of the courts has invariably been that the power to license necessarily includes the power to prescribe conditions for obtaining the license, and the courts cannot limit these conditions to the capacity of the licensees to comply with them. See *People* v. *Martin*, 203 App. Div. (N. Y.) 423.

In *Auto Transit Co.* v. *Fort Worth*, 182 S. W. 685, the court said at page 692:

> "Nor does the fact that the plaintiffs herein are not in a position to comply with the terms

> and provisions of the ordinance under discussion, of itself, establish the invalidity or unreasonableness of such ordinance. It is true that the provision requiring a surety bond may necessitate the incurrence of an expense which the plaintiffs may not be able to bear, and that therefore they will be required to abandon the operation of their motor buses, but that of itself does not establish the unreasonableness or invalidity of the ordinance."

In *Puget Sound Traction Company* v. *Grassmyer,* 173 Pac. 505 (Wash. 1918) the defendant was charged with violating a provision of the State law requiring jitney companies to deposit bonds with the State. The defendant claimed that it was impossible to comply with the provisions since they could not get the type of bond required. At page 507 of the opinion the court replies to this contention:

> "Again it is said that the bond required is impossible of procurement. * * * Conceding this to be true it would not constitute a defense. This we have held in the recent case of *Hadfield* v. *Lundin,* 98 Wash. 657."

In *Hadfield* v. *Lundin,* 168 Pac. 516 (Wash.), a case involving public vehicle insurance, the court says at page 519:

> "It is urged that the statute is unconstitutional in that it deprives appellant of his liberty and property without due process of law and in that it deprives him of equal protection of the laws. We have twice held this law constitutional. But it is argued that in neither of these cases did it appear that the bonds of

the character prescribed by the law could not be procured, which fact does appear in the records now before us, and which, it is asserted demonstrates the unconstitutionality of the law. We shall confine our discussion to a consideration of that question. * * *

"The use of the streets as a place of business is accorded as a mere privilege and not as a matter of natural right. Since the use of the streets in the prosecution of business as such is not a right but a mere license or privilege, it follows that the legislature may prohibit such use entirely without infringing any provision either of the State or Federal Constitution. * * * Nor can it be questioned that the power to prohibit includes the power to regulate even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power exists the reasonableness of the regulation is a legislative question pure and simple. To hold otherwise would be to assert an absurdity * * * the expediency of the action is not a question for the court.

"The complaint before us shows that the statute in question not only could be complied with but that for over a year was complied with by appellant himself. If, as asserted, appellant is now unable to meet these requirements because of the character of the bond required by the act cannot be secured, then he is not entitled to the privilege, which the statute grants, and this simply because the grant was conditioned upon the meeting of those requirements."

In *Packard* v. *Banton*, 264 U. S. 140, at page 145, the court says:

> *"Affidavits filed below on behalf of appellees tend to show that insurance policies in mutual casualty companies may be secured for $540.00 a year; and that operators of upwards of a thousand cars furnish personal bonds. The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance of permission. In the latter case the power to exclude all together generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."*
>
> See also *Nolen* v. *Riechman*, 225 Fed. 812; *State* v. *Transfer Co.*, 90 Wash. 416.

5. Other contentions of plaintiffs and comments on plaintiffs' authorities.

Plaintiffs attack Section 65-48 of the ordinance which provides in substance that whenever the City Treasurer has suspended or revoked a public vehicle license the applicant may appeal to the City Manager and the decision of the City Manager shall be final. It is argued that this section vests final judicial authority in the City Manager, an administrative officer, and in effect prevents recourse to the courts. The absurdity

of this argument is palpable. Recourse to the courts is always available to those who believe they have been injured by an abuse of discretion of an administrative officer in refusing to issue a license or permit. If this section were not in the ordinance, the final authority to issue and revoke permits would then be lodged in the Director of Public Utilities of the city of Cincinnati, and those against whom an unfavorable decision was made by the Director would have no greater right to apply to the court to set aside such decision than they now have when the final decision is made by the City Manager. In fact, the provision is made for the benefit of applicants because it provides for an administrative review of a decision of the Director, and that gives the applicant two chances whereas without the section he would only have one. Furthermore, these sections have already been held valid by the Court of Appeals of Ohio in *Klein* v. *City,* 30 O. L. R. 217.

> "It is further claimed that the ordinances vest judicial power in executive officers of the city. The revocation of a license is not a judicial act."

We have already distinguished many of the cases cited by opposing counsel. In his argument in the court below, counsel placed considerable reliance on the case of *City of Rockford* v. *Nolan,* 316 Ill. 60, stating that this case held that "driverless auto companies" are private businesses and therefore not subject to regulation (counsel cites this case at pages 32 and 33 of his brief in this court). The case holds nothing of the kind. The case merely holds that an

Illinois city, which has no home-rule authority similar to municipalities in Ohio, derives its power solely from the State statutes, and if these statutes do not clothe a city with power to regulate a certain type of automobile for hire, the city cannot enact such regulation. Syllabus 1 contains the reason for the court's decision:

> "A municipality possesses no inherent power but its existence and its power are derived from the General Assembly, and in order to legislate upon or with reference to a particular subject or occupation it must be able to point out the statute which gives it the power so to do."

Because of the Ohio Home-Rule provisions and also because of G. C. 3632, above quoted, the reasons for the decision in the Illinois case do not apply here.

Despite the fact that counsel for plaintiffs, as appears from the long list of cases in his brief, made an exhaustive search of the authorities, he does not cite a single case in which a regulation of driverless automobiles similar to the Cincinnati ordinance has been declared unconstitutional by the courts.

The ordinance is presumed by law to be constitutional and the burden is on the plaintiffs to show that the ordinance has no real or substantial relation to the public welfare and safety before the court can invalidate it.

Powell v. *Pennsylvania*, 127 U. S. 684.
Cusak v. *Chicago*, 242 U. S. 526.
Pritz v. *Messer*, 112 O. S. 628.

In the last mentioned case at page 638 the court states the rule as follows:

"As a preface to our discussion of this question we must remind ourselves that the test is not whether this court, sitting as a city council, would have enacted the ordinance challenged. The members of this court may or may not conceive that such an ordinance is wisely calculated to preserve the public health, morals or safety. If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to public health, morals and safety, it must be held void. When, however, legislation does have a real and substantial relation to the prevention of conditions detrimental to the public health, morals, or safety, no matter how unwise the measure itself seems to individual judges, it is not fair for the judicial tribunals to nullify it upon constitutional grounds."

The appellants in error cite *Hissem* v. *Guran*, 112 O. S. 59. It is submitted that the Hissem case stands only for the proposition that the defendant in that case did not constitute a common carrier and that one who is a private carrier in fact could not be converted into a public utility or common carrier by mere legislative fiat. It is our contention, then, that the principles laid down in the Hissem case are in no way applicable to the case at bar. As a matter of fact the Hissem case was distinguished by this court in *Craig* v. *Public Utilities Commission*, 115 O. S. 512, where this court said:

"Where an owner of trucks employs the same partly in the prosecution of his own business and partly in hauling goods and merchandise for the public for hire, there is a partial dedica-

> tion of such property to the public service, and, to the extent of such dedication and such use, the hauler is a 'common carrier'."

This doctrine was followed in *Coleman* v. *Public Utilities Commission,* 115 O. S. 638. See also *Breuer* v. *Public Utilities Commission,* 118 O. S. 95.

The case of *Motor Freight, Inc.* v. *Public Utilities Commission,* 120 O. S. 1, we submit, has no bearing upon the case at bar. In that case the question for decision was whether or not the plaintiff was a common carrier and did not in any way involve the question of the power of a municipality to regulate and control motor vehicles which used the streets of the municipality to an extraordinary extent for private gain.

Conclusion.

We have shown that the business of renting driverless automobiles necessarily and essentially involves the use of the public streets for private profit whether or not such automobiles constitute common carriers; that such use of the public streets is not a legal right but a mere privilege which may be regulated and, in fact, even prohibited by the municipality; that the regulation imposed by the ordinance is directly, vitally, and intimately connected with the protection of the public safety and welfare; that similar regulations covering taxicabs, jitney buses, motor buses, and automobiles for hire have been uniformly sustained by the courts including the United States Supreme Court; that the principles in these cases are precisely similar to those involved in the present case, and, in fact, have been extended to regulations specifically cover-

ing driverless automobile companies in all the cases in which this precise question has been before the court; that the ordinance does not deprive the plaintiffs of due process of law since they can assert no legal right which the city has invaded; that the ordinance does not deny to the plaintiffs the equal protection of the laws since the classification made is reasonable and justifiable and the provision applies equally to all the members of this class; that the ordinance in no sense creates liability without fault or adds to remedies or rights of action which have been provided by the ordinance; and finally that the ordinance is presumptively constitutional and must be sustained unless it manifestly appears that it is purely fanciful, arbitrary, and unrelated to the promotion of the public good.

In view of the appalling record of deaths and injuries resulting from the negligent operation of automobiles in this city, we submit, that the complaint of the plaintiffs that if the ordinance is enforced against them they will be unable to make as much profit from the rental of the city streets as they now make should not defeat the city's attempt to make its streets more safe for its citizens and to provide some measure of compensation for injuries caused by the negligent and irresponsible driver.

Respectfully submitted,

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(1339)